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16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

18 INTEL CORPORATION,

Case No. 3:19-cv-07651-EMC

19 Plaintiff,

20 v.

21 FORTRESS INVESTMENT GROUP LLC,
FORTRESS CREDIT CO. LLC, UNILOC
22 2017 LLC, UNILOC USA, INC., UNILOC
LUXEMBOURG S.A.R.L., VLSI
23 TECHNOLOGY LLC, INVIT SPE LLC,
INVENTERGY GLOBAL, INC., and IXI IP,
24 LLC,

**DEFENDANTS' JOINT CONSOLIDATED
RESPONSE TO BRIEFS OF AMICUS
CURIAE**

Hon. Edward M. Chen

Date: September 16, 2021
Time: 1:30 p.m.
Dept.: Courtroom 5

25 Defendants.

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1 **I. INTRODUCTION**

2 In accordance with the Court’s order, Dkt. 266, Defendants submit this consolidated
3 response to the amicus briefs filed by the following parties: (1) ACT | The App Association (the
4 “App Association”), Dkt. 257 (“App Brief”); and (2) Unified Patents, LLC, Dkt. 265 (“Unified
5 Brief”).

6 Amici provide no basis for denying Defendants’ Joint Motion to Dismiss and Strike
7 Plaintiffs’ Second Amended Complaint, Dkt. 244 (“Motion”). Just as in the two prior amicus
8 briefs that the App Association and Unified Patents have filed, significant portions of their briefs
9 consist of policy arguments about the supposed infirmities of the patent system and generalized
10 attacks that have nothing to do with whether the Second Amended Complaint (“SAC”) states a
11 claim under Rule 12(b)(6). And when the amici do address the proper pleading of an antitrust
12 claim, their arguments are either irrelevant, incorrect, and/or merely repetitive of the arguments in
13 Intel’s opposition.¹ In sum, just as Defendants have demonstrated twice before, nothing in the
14 amicus briefs rescues the SAC’s failure to plead a single cognizable antitrust claim.

15 **II. THE ARGUMENTS MADE BY AMICI ARE IRRELEVANT AND FLAWED**

16 **A. The App Association²**

17 The vast majority of the App Association’s brief is, verbatim, recycled from its previous
18 briefs. *Compare* Dkt. 257 with Dkts. 205-1, 131. As before, it does not address any of the issues
19 raised in Defendants’ Motion, nor does it meaningfully discuss the necessary elements of an
20 antitrust claim.

21 Instead, the bulk of the App Association’s brief is just an indictment of the United States
22 patent system. According to the App Association, so-called “abusers of the patent system” are
23 able to prey on “small companies,” who “often do not have the resources or time to engage in
24 lengthy and expensive litigation [,] . . . banking on a quick settlement with little or no protest.”

25

26 ¹ See, e.g. Unified Brief at 7:17-8:1, 9:14-19. Defendants do not address amici’s arguments that
27 merely parrot arguments raised by Intel in its opposition brief, as those arguments are addressed in
Defendants’ concurrently-filed reply brief.

28 ² Intel is a sponsor of the App Association. See ACT | The App Association, *Sponsors*, available
at <https://actonline.org/sponsors/>.

1 App Brief at 4:8-13; *see* Dkt. 205-1 at 4:9-16 (same). But even assuming that this policy-based
2 concern has any merit, it has nothing to do with the numerous pleading deficiencies Defendants
3 demonstrate in their Motion (*e.g.*, Intel’s failure to plead a viable market, direct evidence of
4 anticompetitive harm, antitrust standing, a cognizable antitrust injury, or a Sherman Act or
5 Clayton Act violation). *See Ward v. Wells Fargo Home Mortg.*, No. 14-CV-00887-JCS, 2014 WL
6 1922082, at *9 (N.D. Cal. May 6, 2014) (“[P]olicy arguments are inapposite to the Court’s task at
7 hand, which is to determine whether the claims made in the Complaint are legally sufficient to
8 survive the standard set forth in Rule 12(b)(6) of the Federal Rules of Civil Procedure.”).

9 Moreover, the App Association’s policy concerns are inapplicable to this case, which is not
10 about “small companies.” Intel (and its prior co-plaintiff, Apple) are two of the largest and most
11 powerful corporations in the world. Intel does not allege in the SAC that Defendants have ever
12 brought abusive infringement claims against any small companies. The App Association’s brief
13 does not argue otherwise. Nor is this case about trying to extract a “quick settlement” (App Brief
14 at 4:10), which would be an implausible strategy against Intel anyway given its extensive
15 resources. According to the SAC, the underlying patent suits involve protracted litigation
16 implicating billions of dollars. *See, e.g.*, SAC ¶¶ 11, 125, 271. Notably, the App Association does
17 not name a single “small company” out of its 5,000 members that has supposedly been “abused”
18 by any of the Defendants. Thus, whatever the merits of the App Association’s arguments about
19 supposed abusive patent assertions against small companies, they are simply irrelevant here.

20 To the extent that the App Association does address antitrust pleading requirements, its
21 arguments are meritless. The App Association claims that the SAC exceeds the standard
22 articulated in *Conley v. Gibson*, 355 U.S. 41 (1957). App Brief at 7:10-8:4. As explained in
23 Defendants’ concurrently-filed reply, however, this is the wrong standard. The Ninth Circuit has
24 expressly observed that for pleading an antitrust claim, *Twombly* abrogated the standard
25 articulated in *Conley*. *See Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013) (“We have
26 held that for pleading an antitrust claim, the U.S. Supreme Court in *Bell Atlantic Corp. v.
27 Twombly*, 550 U.S. 544 (2007), ‘specifically abrogated the usual notice pleading rule’ under Rule
28 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41 (1957.”); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042,

1 1047 n.5 (9th Cir. 2008) (“At least for the purposes of adequate pleading in antitrust cases, the
2 Court specifically abrogated the usual ‘notice pleading’ rule, found in Federal Rule of Civil
3 Procedure 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957).”).

4 Regardless, the App Association fails to explain how the SAC successfully states an
5 antitrust claim under any standard. Indeed, its brief only highlights the critical allegations that the
6 SAC is lacking. For example, contrary to the App Association’s assertion, Intel does not allege
7 that it “ha[s] no alternatives” to Defendants’ patents. *Compare* App Brief at 7:24-26 (asserting
8 that the SAC “comprehensively describes” “inflated royalties from licensees who have no
9 alternatives.”) *with* Motion at 16:2-17:4 (demonstrating that the SAC does not allege how many
10 other substitute patents are available in the purported markets). On the contrary, the SAC
11 acknowledges the availability of other substitutes within each market, *see* Motion at 24 n.19
12 (citing SAC ¶ 149), and Intel has repeatedly failed to allege that it has no viable alternatives
13 despite this Court’s instructions that such allegations are necessary, *id.* at 29:7-21 (citing 1st
14 Order, Dkt. 190, at 16:7-11). Moreover, as Defendants noted in their Motion, and the App
15 Associations does not dispute, there are hundreds if not thousands of other patents in each of the
16 alleged “markets.” *Id.* at 24:3-4.

17 Similarly, the App Association argues that the SAC “provides an ample amount of
18 specificity detailing how defendants . . . have engaged in a campaign of anticompetitive patent
19 aggregation by Fortress and a complex network of PAEs that Fortress controls.” App Brief at
20 7:19-21. But the SAC does not allege any evidentiary facts to support this theory (let alone an
21 “ample amount”). For example, the SAC contains no evidentiary facts demonstrating that the so-
22 called PAE³ Defendants had any intent to aggregate patents when they entered into their alleged
23 agreements with Fortress, nor does it identify any instance in which any PAE Defendant has
24 attempted to leverage the substitute patents allegedly held by one of the other PAE Defendants. It
25 is thus unclear how Defendants have purportedly engaged in an alleged “campaign” against Intel.
26

27 _____
28 ³ In order to be consistent with the vernacular in the SAC and for purposes of this response only,
Defendants use the term “PAE” in the same way that the SAC employs it.

1 **B. Unified Patents**

2 Unified Patents' brief raises equally irrelevant and/or meritless arguments. A large portion
3 of the brief consists of an "update" regarding the supposed "status of mass patent aggregation."
4 Unified Brief at 2:25-6:23. Unified Patents first identifies other alleged investments that Fortress
5 has supposedly made. Unified Brief at 3:5-12. But this is irrelevant. The SAC does not allege
6 that any of these investments were anticompetitive, and an amicus is not entitled to allege new
7 facts. *See, e.g., Students for Fair Admissions v. President & Fellows of Harvard Coll.*, No. 14-
8 CV-14176-ADB, 2018 WL 9963511, at *1 (D. Mass. Oct. 3, 2018) ("[A]n amicus who argues
9 facts should rarely be welcomed.") (internal quotation marks omitted); *Smith v. United States*, 343
10 F.2d 539, 541 (5th Cir. 1965) (A court cannot "consider the new factual material included in the
11 brief of the amicus."). Regardless, Unified Patents does not even claim that these investments
12 involved substitute patents—so it is unclear how these acquisitions have any relevance to Intel's
13 antitrust claims in this case—and it does not claim that any of these newly-acquired patents have
14 been asserted against Intel. Unified Patents also claims that "other mass aggregators are likewise
15 surging in size." Unified Brief at 4:13-6:23. But the supposed conduct of third parties has nothing
16 to do with whether Intel has adequately pleaded an antitrust claim against the Defendants in this
17 case.

18 Unified Patents next attacks Defendants' Request for Judicial Notice (Dkt. No. 244-1),
19 which Intel has not even opposed. Unified Br. at 7:18-9:3. Specifically, Unified Patents claims
20 that Defendants are improperly asking the "Court to notice particular facts about those patents or
21 the technology involved." Unified Brief. at 7:19-21. This is incorrect. As explained in the
22 concurrently filed reply, Defendants are not asking the Court to make any factual findings
23 regarding the patents. Rather, it is Intel's burden to allege facts demonstrating that these patents
24 are economically interchangeable. It has not done so, as demonstrated by the text of the patents
25 themselves, which Unified Patents does not dispute are both judicially noticeable and incorporated
26 by reference. For example, five out of the seven patents in the alleged "Generating Alerts Based
27 on Blood Oxygen Level" market do not even discuss "oxygen" at all, thus making it difficult to
28 understand how the patents in this "market" could all be economically interchangeable as required

1 by law. Motion at 10:6-11; RJD at 2:11-14. Unified Patents accuses Defendants of just focusing
2 on “a single word”—“oxygen.” Unified Br. at 8:17-21. But that single word is critical to how
3 Intel has chosen to define the market. Unified Patents also argues that determining whether
4 patents are “substitutes” would require detailed “claim construction” analysis. Unified Br. at 7:26-
5 9:3. If that is true, however, then Intel clearly has not met its burden of pleading facts sufficient to
6 show that the patents in each market are substitutes since the SAC does not contain any such claim
7 construction analysis.

8 Finally, Unified Patents “invites the Court to compare the standard faced by Defendants
9 when asserting infringement as patent holders to the standard they ask the Court to impose on
10 Plaintiffs.” Unified Brief at 9:26-27. But Intel must satisfy the pleading requirements for its
11 antitrust claims as articulated by the Supreme Court and Ninth Circuit. Intel has failed to do so for
12 a third time. The pleading requirements to adequately allege infringement are simply irrelevant.

13 **III. CONCLUSION**

14 The arguments and assertions raised by amici are irrelevant, incorrect, repetitive, and/or
15 inconsistent with Ninth Circuit authority and this Court’s Orders. For all of the reasons stated in
16 Defendants’ Motion and Reply, the SAC should be dismissed. Nothing in the amicus briefs
17 demonstrates otherwise.

18 Dated: July 8, 2021

Respectfully submitted,

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ECF ATTESTATION

I, Lucas S. Oxenford, am the ECF user whose ID and password are being used to file DEFENDANTS' JOINT CONSOLIDATED RESPONSE TO BRIEFS OF AMICUS CURIAE. I hereby attest that I received authorization to insert the signatures indicated by a conformed signature (/s/) within this e-filed document.

By: /s/ Lucas S. Oxenford
Lucas S. Oxenford